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(16)

33pp No. 06-1082

FILED

DEC 28 2007

OFFICE OF THE CLERK
SUPREME COURT, U.S.

In The

Supreme Court of the United States

COMMONWEALTH OF VIRGINIA,

Petitioner,

v.

DAVID LEE MOORE,

Respondent.

On Writ Of Certiorari To The Supreme Court Of Virginia

REPLY BRIEF OF THE PETITIONER

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REPLY BRIEF OF THE PETITIONER

I. THE CONSTITUTIONAL STANDARD OF PROBABLE CAUSE OPERATES INDEPENDENTLY OF ANY ADDITIONAL PROTECTIONS PROVIDED BY THE STATES.

Respondent's central contention is that when a State enacts a law prohibiting arrest under specified circumstances, it disavows any governmental interest in an arrest under those circumstances, and such an arrest therefore violates the Fourth Amendment's reasonableness requirement. Contrary to that contention, the Fourth Amendment establishes an independent, uniform standard for when an arrest in a public place is reasonable – *i.e.*, when the arresting officer has probable cause to believe that an individual has committed a crime. States are free to impose additional restrictions on arrest that go beyond Fourth Amendment requirements and frequently do so, often for reasons unrelated to Fourth Amendment interests. But when States impose those additional state-law restrictions, for whatever reason, they do not change the Fourth Amendment calculus, and they do not trigger constitutionally-mandated remedies like the exclusionary rule.[1]

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[1] If the balancing required by the Fourth Amendment turns on governmental policy choices, the logical extension of Moore's argument calls into question the probable cause standard itself. For example, where a State has determined that

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Respondent's proposal to replace the uniform probable cause standard with a rule that Fourth Amendment protections would vary when a State, for its own policy reasons, affords greater protections would hand States the ability effectively to overrule numerous of this Court's decisions for in-state police conduct. If respondent's theory were correct, a State that enacted a law prohibiting pretextual arrests would effectively overrule *Whren v. United States*, 517 U.S. 806 (1996). A State that enacted a law requiring a warrant for a public arrest for some or all felonies would effectively overrule *United States v. Watson*, 423 U.S. 411 (1976). A State that limited officers to justifying an arrest based on the grounds given at the time of arrest would effectively overrule *Devenpeck v. Alford*, 543 U.S. 146 (2004). And a State that prohibited searches incident to arrest unless the arresting officer had specific grounds to believe that the offender presented a threat to the officer's safety or would destroy evidence would effectively overrule *United States v. Robinson*, 414 U.S. 218 (1973).

Such a system would make fundamental Fourth Amendment protections turn on the actions of the legislatures of the States and thus vary from place to place and from time to time. It would substitute for

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the apprehension of certain criminals, such as murderers or rapists, is of paramount significance, that heightened interest, under Moore's legislative choice balancing, would outweigh a suspect's interests so as to justify an arrest based on less than probable cause.

the uniform probable cause requirement held sufficient to protect against arbitrary police action in *Atwater v. City of Lago Vista*, 532 U.S. 318 (2001), a new regime of 50 different Fourth Amendments. It would deter States from providing *any* such enhanced protections by depriving state legislatures of the ability to calibrate the remedies for such extra-constitutional protections, avoiding (as Virginia has) the heavy sanction of exclusion for state-law violations. And it is irreconcilable with this Court's repeated holdings that, although States are free as a matter of their own law to impose greater restrictions on police activity than those this Court has determined are required by the Fourth Amendment, they "may not impose such greater restrictions as a matter of *federal constitutional law* when this Court specifically refrains from imposing them." *Arkansas v. Sullivan*, 532 U.S. 769, 772 (2001) (quoting *Oregon v. Hass*, 420 U.S. 714, 719 (1975)).

Respondent seeks to pare back his disruptive theory by arguing that it would not apply to restrictions on arrest authority that "have nothing to do with the Fourth Amendment's long-established weighing of the public interest served by a custodial arrest." Resp't Br. 39.[2] However, the respondent offers

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[2] At the same time that the respondent claims that courts can and must sift legislative purpose to separate those statutes that have, in his view, Fourth Amendment significance, from those that do not, the respondent also contends inconsistently that courts should not seek to "divine governmental purposes that the government itself denies." Resp't Br. 17. But even if

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no basis to determine which limitations on arrest reflect on a weighing of Fourth Amendment interests and which do not. Many of the state law restrictions that respondent contends would not be incorporated into the Fourth Amendment appear on their face to reflect some balancing of citizens' interests in privacy and liberty against the State's interests in making arrests and searches. Those restrictions include state law warrant requirements, state laws requiring a heightened standard of suspicion for arrest based upon information on an informant, state law limits on the type of officer authorized to arrest, state laws requiring a hearing before the occupant of a residence can be removed as a trespasser, and state laws requiring an opportunity to respond to a misdemeanor charge before process can be issued. *See* Pet'r Br. 36-42. Respondent confidently asserts that none of those restrictions reflects a State's balancing of Fourth Amendment interests, but he offers no explanation for that counterintuitive assertion.

Surely, this Court and other federal courts are not expected to ascertain the Fourth Amendment's protections by probing the legislative history of state law enactments – assuming such legislative history is even available for state statutes or regulations. And,

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such sifting is possible, the respondent cannot dispute that it would greatly complicate suppression hearings by requiring an examination of state statutes and regulations, as opposed to a straightforward assessment of the existence of probable cause.

even if the scope of the Fourth Amendment did depend on the motivations of state legislatures, determining whether a particular state restriction on arrest actually reflects a judgment that individual privacy and liberty interests outweigh the State's interest in making an arrest would be an impossible task. As respondent himself acknowledges, even state laws requiring citation in lieu of arrest "further other significant governmental interests" besides protection of individual privacy and liberty, such as conservation of police resources and the public fisc. Resp't Br. 15. There is thus no basis for the fundamental assumption underlying all of respondent's arguments – that Virginia's requirement of citation rather than arrest for respondent's offense reflects the State's judgment that individual privacy and liberty interests outweigh the State's interests in making an arrest.

Indeed, the Virginia statute requiring citation itself indicates that Virginia has concluded that there are numerous state interests that can justify an arrest for respondent's offense. The statute authorizes arrest if the offender fails or refuses to discontinue the offense, if the officer believes the offender is likely to disregard a summons, or if the officer reasonably believes the offender is likely to harm himself or others. *Virginia Code* § 19.2-74. And an officer may make an arrest for the offense in any jurisdiction where "prior judicial approval has been granted by order of the general district court," presumably because specific local conditions indicate that routine

custodial arrests are warranted. *Virginia Code* § 46.2-936. Thus, Virginia has determined that the State has an interest in making an arrest for a variety of reasons but it has chosen, as a matter of state policy, to require a case-by-case determination that those reasons are present before permitting its officers to make an arrest.

Virginia is free to require that case-by-case determination as a matter of state law. But this Court has held that the Fourth Amendment's reasonableness requirement does not demand that kind of case-by-case balancing of governmental and private interests before an officer may make an arrest. Instead, the probable cause standard "applie[s] to all arrests, without the need to 'balance' the interests and circumstances involved in particular situations." *Dunaway v. New York*, 442 U.S. 200, 208 (1979). The Fourth Amendment does not require a case-by-case determination of whether the State's interests in making an arrest outweigh the individual's privacy and liberty interests because Fourth Amendment requirements reflect the reality that *every* situation in which probable cause exists may implicate the interest in abating wrongdoing and ensuring compliance with process. The constitutional standard also incorporates the important interest in easily administrable rules governing police conduct. Virginia may, as a matter of state law, choose to give less weight than the Constitution to the importance

of administrable rules, but Virginia's choice does not change what the Fourth Amendment requires.[3]

Furthermore, legislative bodies lack "the power to determine what constitutes a constitutional violation," *City of Boerne v. Flores,* 521 U.S. 507, 519 (1997), and it is for the judiciary, ultimately, "'to say what the law is,'" *Sanchez-Llamas v. Oregon,* 126 S. Ct. 2669, 2684 (2006).[4] The rule advocated by respondent would render the policy judgments of governing bodies, the central, if not the determinative, factor in determining the constitutionality of many arrests and thus would effectively shift the role of assessing the propriety of an arrest from the judiciary to the legislative body.[5]

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[3] The logic of Moore's balancing would spill over into other areas of constitutional law where a State's interest is balanced against a private individual's interest. For example, the constitutional analysis of speedy trial involves a balancing of the State's interest in prosecuting a defendant with a defendant's interest in the prompt resolution of the charge. *See, e.g., United States v. Loud Hawk*, 474 U.S. 302, 313-14 (1986). If a State enacts a speedy trial statute, under Moore's balancing test, this state law policy choice would be imbued with constitutional significance.

[4] *See also Crowell v. Benson,* 285 U.S. 22, 60 (1932) ("In cases brought to enforce constitutional rights, the judicial power of the United States necessarily extends to the independent determination of all questions, both of fact and law, necessary to the performance of that supreme function.").

[5] This does not mean that state legislature cannot determine that an arrest is unreasonable *as a matter of state law*. Except where limited by the State Constitution, a state legislature is free to create substantive rights that are greater

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Under the paradoxical guise of honoring federalism, the standard urged by Moore and his amici would significantly undermine the sovereign authority of the States to determine how to punish *state officers* who violate *state law*. The decision below conflates the authority of a State – as a matter of state law – to enact protections for its citizens that exceed the federal constitutional standard with the federal constitutional standard itself. *See Sullivan*, 532 U.S. at 772.

In every arrest, the government's interests include ensuring the presence of a suspect for trial, obtaining evidence of a crime, preventing future harm, providing certain social service functions, and maintaining proper respect for the law and the police. Those interests exist upon arrest whether or not the legislature chooses to restrict the authority of its police officers in certain situations, and to enforce those restrictions through the tort system. Conversely, an individual's interest in avoiding the intrusion of an arrest, from a federal constitutional standpoint, does not vary based on policy choices made by the state legislatures.

Furthermore, although Moore contends that his proposed balancing would honor the "desirability of

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than those guaranteed by the United States Constitution and state courts might conclude that their constitutions or statutes require suppression of evidence where the United States Constitution does not require suppression.

flexibility and experimentation" for state legislatures, Resp't Br. 19, his proposed rule would create a powerful disincentive for such flexibility and experimentation. Instead of permitting the States to choose how violations of state statutes by state officers should be punished, the States would face the "one size fits all" straightjacket of the exclusionary rule.

Ultimately, in assessing the constitutionality of an arrest under the Fourth Amendment, the balancing of interests should not turn on policy choices made by local governing bodies, state legislatures, or the United States Congress. Instead, "the requisite 'balancing' has been performed in centuries of precedent and is embodied in the principle that seizures are 'reasonable' only if supported by probable cause." *Dunaway*, 442 U.S. at 214.

II. RESPONDENT'S POSITION GAINS NO TRACTION FROM THE COMMON LAW OR THIS COURT'S JURISPRUDENCE.

A. The Common Law Affords Respondent No Support.

Respondent and his amici draw selective excerpts from common law principles in an effort to alter the constitutional standard. That attempt fails. "There is no historical evidence that the Framers or proponents of the Fourth Amendment, outspokenly opposed to the infamous general warrants and writs of

assistance, were at all concerned about warrantless arrests by local constables and other peace officers." *Atwater*, 532 U.S. at 339-40. Because the Bill of Rights originally did not apply to the States, *Barron v. Mayor of Baltimore*, 32 U.S. (7 Pet.) 243, 247 (1833), it is difficult to see why venerable state cases assessing tort liability against officers who exceeded their bounds under state law should be infused with federal constitutional significance. Indeed, constitutionalizing state false arrest statutes runs counter to one of the most prominent arguments made by the Framers – that the new Constitution would preserve rather than eviscerate state sovereignty. *See, e.g.*, *The Federalist No. 32* at 165-66 (Alexander Hamilton); *The Federalist No. 45* at 256-62 (James Madison).[6] *Cf. The Federalist No. 51* at 291-93 (James Madison) (emphasizing the role of the States in curbing the National Government).

At common law, an officer could generally arrest without a warrant for misdemeanors "committed in the presence of the arresting officer." *Atwater*, 532 U.S. at 336.[7] The relevant standard here is the one in existence "when the [Fourth] Amendment was framed." *Florida v. White*, 526 U.S. 559, 563 (1999). Furthermore, while the historical record is "not

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[6] Throughout this Brief, all page number citations to *The Federalist* are from *The Federalist Papers* (Clinton Rossiter, ed. 1961, Mentor Books Edition 1999).

[7] *See also* Jacob W. Landynski, SEARCH AND SEIZURE AND THE SUPREME COURT 45 (1966).

unequivocal," the historical record shows "two centuries of uninterrupted (and largely unchallenged) state and federal practice permitting warrantless arrests for misdemeanors not amounting to or involving breach of the peace." *Atwater*, 532 U.S. at 340. Thus, while the particularities of state law have and will continue to vary, the historical record does not support the proposition that a breach of these state laws amounts to a *constitutional* violation. Since the common law at the time of the Framing authorized an arrest for a misdemeanor that occurred in the officer's presence, the arrest here satisfied common law standards.[8]

The National Association of Criminal Defense Lawyers cite a number of older precedents from the courts of England and the States in support of the proposition that an arrest that violates state law strictures of arrest is unreasonable as a matter of federal constitutional law. At the heart of this

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[8] In eighteenth-century England, and in her fledgling colonies, a person wrongfully arrested did not enjoy many of the pre-trial procedural rights that an accused benefits from today. Once arrested, a detainee could be confined for an indefinite period, sometimes years, often in deplorable conditions. *See* Sam B. Warner, *The Uniform Arrest Act*, 28 VA. L. REV. 315, 315 (1942). Under this Court's modern jurisprudence, to cite one example, an accused has the right to an arraignment within forty-eight hours. *See County of Riverside v. McLaughlin*, 500 U.S. 44, 56 (1991). State laws often afford additional protections above the federal constitutional floor. *See Virginia Code* § 46.2-936 (providing for the "immediate" appearance of an arrestee before a magistrate).

argument lies a *non-sequitur*: that an action that is unreasonable under state law must *ipso facto* be unreasonable under the United States Constitution.

To the contrary, older cases in which an officer or a private party is sued in tort for violating a state statute regulating arrest authority actually support the argument that such strictures are a matter of state law rather than federal constitutional law.[9] Those decisions are devoid of any hints that an arrest made in violation of a state statute implicated state constitutional principles analogous to the Fourth Amendment or that such arrests violate some fundamental tenet of the common law. Instead, the decisions treat the illegal arrest as a straightforward

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[9] *See Elk v. United States*, 177 U.S. 529, 534-35 (1900) (discussing power of arrest in statutory rather than constitutional terms and noting common law pedigree of right of an officer to arrest for a misdemeanor committed in his presence). *See also Brock v. Stimson*, 108 Mass. 520 (1871) (holding that although arrest without a warrant for being drunk in public was proper, police chief was liable in trespass because, under state statute, the officer was required to release the individual rather than following through with a charge); *Phillips v. Fadden*, 125 Mass. 198 (1878) (same); *Delafoile v. New Jersey*, 24 A. 557 (N.J. 1892) (assessing tort liability against officially sanctioned private law-enforcement association for illegal trespass into an inn); *Phillips v. Trull*, 11 Johns. 486 (N.Y. 1814) (private person liable in tort for assault and false imprisonment because he could not arrest for breach of the peace after the affray had ended); *Lyons v. Worley*, 4 P.2d 2 (Okla. 1931) (arrest occurred following collision between automobile and horse team was illegal under state statute; the officer was, therefore, liable in tort for trespass because the misdemeanor traffic offense did not occur in the officer's presence).

matter of state statutory law, to be remedied as provided by the state legislature. This is precisely Virginia's position in the case at bar. Those decisions are entirely consistent with the notion that merely because an arrest is illegal and, therefore, unreasonable as a matter of *state law,* this does not render the arrest unreasonable from a constitutional standpoint.

An additional obstacle to the invocation of history is the fact that the Framers "did not equate an officer's misconduct with government illegality; rather they perceived only personal misconduct when an officer exceeded his official authority. Hence, misconduct by an ordinary officer could not constitute an 'unconstitutional' government act." Thomas Y. Davies, *Recovering the Original Fourth Amendment*, 98 MICH. L. REV. 547, 660 (1999). The remedy for an unlawful arrest at common law was a civil action for money damages. *See Payton v. New York*, 445 U.S. 573, 592 (1980). That is exactly what Virginia law provides. Virginia's statutory scheme is entirely faithful to common law traditions.[10]

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[10] The exclusionary rule, in contrast, was adopted a hundred and twenty-five years after the adoption of the Fourth Amendment. *See* Henry J. Friendly, *The Bill of Rights as a Code of Criminal Procedure*, 53 CALIF. L. REV. 929, 952-53 (1965).

B. This Court's Jurisprudence Affords Moore No Support.

1. This Court Has Never Infused State Laws Governing Arrests With Constitutional Significance.

Moore erroneously contends that this Court has previously settled the issue. That assertion is simply wrong. Despite more than two hundred years of jurisprudence, Moore cites only two cases in support of his argument. Neither case supports his view. In *Johnson v. United States*, 333 U.S. 10 (1948), a federal prosecution, the Court relied on *United States v. Di Re*, 332 U.S. 581 (1948) for the proposition that "[s]tate law determines the validity of arrests without warrant." *Johnson*, 333 U.S. at 15 n.5.

As explained in Virginia's opening brief, *Di Re* announced a prudential doctrine based on federal statutory law to govern arrests made by federal officers. *Di Re* did not purport to expand the constitutional standard governing arrests. *See* Pet'r Br. at 32-33. Similarly, as noted in Virginia's Opening Brief, *Michigan v. DeFillippo*, 443 U.S. 31 (1979) affords the defendant no support. Pet'r Br. at 35. The reference to state law in that case was clearly dictum, because the defendant did not challenge the validity of his arrest. *Id.* at 36. Moreover, because state law defines what constitutes a crime, the propriety of an arrest, in that limited sense, rests on a foundation of state law.

The ACLU, as amicus, attempts to marshal *Ker v. California*, 374 U.S. 23 (1963) in support of an argument that state laws are dispositive of the constitutional standard for arrests. ACLU Amicus at 7. At issue in *Ker* was the propriety of a warrantless entry into an apartment, where the police found marijuana. *Id.* at 28-29. In assessing the arrest proper, as opposed to the entry into the home without a warrant, a plurality of the Court noted that "[t]he lawfulness of an arrest without warrant, in turn, must be based upon probable cause." *Id.* at 34-35. The Court concluded that probable cause was present. *Id.* at 37.

The Court then turned to the question whether the "method of entry" into the home rendered the arrests unconstitutional, notwithstanding the presence of probable cause. *Id.* at 37. During this portion of the analysis, the Court, citing *Di Re* and *Johnson*, noted that "the lawfulness of federal offenses is to be determined by reference to state law insofar as it is not violative of the federal constitution. . . . A fortiori, the lawfulness of these arrests by state officers for state offenses is to be determined by California law." *Ker*, 374 U.S. at 38. This discussion did not occur in the context of the arrest proper, but rather of the warrantless entry into the apartment. In effect, the plurality opinion anticipated subsequent decisions involving warrantless entries into the home. Such entries implicate an intrusion different in scope from an arrest in a public place and accordingly, the analysis differs. *See Payton*, 445 U.S.

at 585-89; *Welsh v. Wisconsin*, 466 U.S. 740, 753 (1994). The plurality opinion ultimately concluded that the entry in *Ker* satisfied state law and, in addition, satisfied the federal standard because exigent circumstances supported the entry. *Ker*, 374 U.S. at 40-41. At any rate, because the warrantless entry into the apartment complied with California law, any statement regarding state law is dictum. *Id.*

With respect to the arrest itself, rather than the entry into the home, the plurality opinion in *Ker* supports Virginia's argument that an arrest based on probable cause is constitutional. *Ker* also stressed that "*Mapp* sounded no death knell for our federalism." *Id.* at 31. The Court held that so long as States respected the "fundamental – *i.e.*, constitutional – criteria established by this Court," the States were free to "develop[ ] workable rules governing arrests, searches and seizures to meet 'the practical demands of effective criminal investigation and law enforcement' in the States." *Id.* at 34. *Ker* thus affirms the promise of federalism and the independence of state policy judgments.

2. The Respondent Fails to Distinguish Cases That Affirm the Independence of the Federal Constitutional Standard from a State's Grant of Additional Protections.

Respondent does not even address *Elkins v. United States*, 364 U.S. 206 (1960). *Elkins* cannot be reconciled with respondent's theory because it holds that the constitutionality of search under the Fourth Amendment is a question of "federal law, neither enlarged by what one state court might have countenanced, nor diminished by what another may have colorably suppressed." *Id.* at 224.

Respondent's distinction of *Greenwood* is unconvincing. The search of the defendant's trash in *Greenwood* was prohibited by California law. *California v. Greenwood*, 486 U.S. 35, 43 (1988). Under respondent's "disavowal of any significant governmental interest theory," California had therefore disavowed any government interest in undertaking the search, and the search could not be reasonable under the Fourth Amendment. Yet the Court held that the search was permissible under the Fourth Amendment, and it expressly rejected the proposition that "whether or not a search is reasonable under the Fourth Amendment depends on the law of the particular State in which the search occurs." *Id.* The only way to reconcile *Greenwood* with respondent's theory would be to adopt a different rule for seizures than for searches. Respondent has made no effort to justify such differential treatment and there is no possible justification.

Cooper v. California, 386 U.S. 58 (1967), is also inconsistent with respondent's theory. *Cooper* clearly held that the search of Cooper's car was reasonable under the Fourth Amendment even though the state court had held that the search was not authorized by state law. 386 U.S. at 60-61. That holding is inconsistent with respondent's "disavowal of any Fourth Amendment interest" theory for the same reason that *Greenwood* is inconsistent with his theory. Also irreconcilable with respondent's theory is the Court's statement in *Cooper* that the State had the "power to impose higher standards on searches and seizures than required by the Federal Constitution" and "when such state standards alone are violated, the State is free, without review by [the Supreme Court], to apply its own state harmless-error rule to such errors of state law." *Id.* at 62. Under respondent's theory, a higher state standard necessarily raises the Fourth Amendment standard, so there can be no violation of the state standard alone.

It is true that, in explaining why the seizure in *Cooper* was reasonable, the Court noted that the police were required by state law to seize the car, and reasoned that the search was therefore reasonable for police protection purposes. 386 U.S. at 61. But the Court did *not* hold that either the search or the seizure would have been unconstitutional if state law had not required the seizure. In fact, both the search and the seizure would have been constitutional. The police could still constitutionally have seized the car as evidence of the defendant's narcotics offense,

because the "evidence showed" that the car "had been used to carry on his narcotics possession and transportation." *Id.* at 60. And, under the Court's reasoning in *Cooper*, once the car was permissibly seized, the police could have searched it "for their own protection." *Id.* at 61. The police also could constitutionally have searched the car under the automobile exception to the warrant requirement because, given respondent's use of the car in his drug business, they had probable cause to believe that it contained narcotics (which it in fact did).

Whren is also inconsistent with respondent's theory. Respondent inaccurately states that "the Court in *Whren* merely held that the right to stop the vehicle was not undercut by *local police practices*." Resp't Br. 50. In fact, the stop of the vehicle was not merely contrary to local police *practices* but prohibited by "District of Columbia police *regulations*." 517 U.S. at 815 (emphasis added). Those regulations permitted the officers at issue to make the traffic stop "only in the case of a violation that is so grave as to pose an *immediate threat* to the same of others." *Id.* (quoting the D.C. regulations). The D.C. regulations in *Whren* thus embodied precisely the kind of balancing of Fourth Amendment interests that respondent contends is reflected in the Virginia law at issue here. Moreover, (under respondent's theory) they reflected a determination by the District that, on balance, the government did not have an interest in making the stop. *See id.* at 816-817 (noting that the defendant in *Whren* was making that very argument). But the Court held that

the mere fact that the regulations prohibited the stop did not render the stop unconstitutional under the Fourth Amendment. *Id.* at 815. The Court also expressly rejected the argument that a case-by-case balancing of interests was appropriate, instead reaffirming "the traditional common law rule that probable cause justifies a search or seizure." *Id.* at 819.

Furthermore, contrary to Moore's suggestion, Virginia does not contend that the Fourth Amendment, in all circumstances, operates in a vacuum that is free of state law considerations. State law is determinative as to whether an offense has been committed. However, once the police obtain, from an objective standpoint, probable cause to believe an individual has committed a crime, the constitutional balance of interests renders the *arrest* reasonable as a matter of federal constitutional law. In other words, the standard of probable cause "applie[s] to all arrests, without the need to 'balance' the interests and circumstances involved in particular situations." *Dunaway*, 442 U.S. at 208.[11]

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[11] Other situations contemplated by the Fourth Amendment may require a different balancing than that required for an arrest. For example, governmental intrusions into the home, *Welsh*, 466 U.S. at 753, or the use of deadly force, *Tennessee v. Garner*, 471 U.S. 1, 9 (1985), implicate different and heightened concerns from a garden variety arrest and, therefore, the analysis proceeds differently. *See Whren*, 517 U.S. at 817-18 (while other areas protected by the Fourth Amendment require balancing, no further balancing is required for an arrest if it is based on probable cause).

The ACLU contends that in numerous contexts, constitutional protections vary depending on state law. Amicus Br. 13-15. For example, the ACLU notes that in due process and takings jurisprudence, State law defines the underlying property interest and federal law then defines the procedures that must attend a deprivation of that interest. The ACLU argues that this is analogous to allowing Fourth Amendment reasonableness to turn on a State's decision to limit the category of "arrestable" offenses. Virginia noted in its opening brief that State law is relevant under the Fourth Amendment because state law defines the conduct that may violate the law and federal law then defines the appropriate standard, *e.g.*, probable cause, that justifies an arrest. This is similar, Virginia noted, to the standard articulated in *Jackson v. Virginia*, 443 U.S. 307 (1979) in assessing the sufficiency of the evidence. State law defines the elements of an offense and federal law then defines the standard of proof to establish them (*i.e.*, beyond a reasonable doubt). The same point applies to due process and takings cases: state law defines the property interest, but federal law defines the *process* by which those interests may be affected by state action. *See, e.g.*, *State Board of Regents v. Roth*, 408 U.S. 564, 577 (1972) (discussing due process protections for employment); *Philips v. Washington Legal Found.*, 524 U.S. 156, 164 (1998) (discussing "takings" of property). A State's decision to afford *more* process to protect a particular property right would not mean that *due process* automatically required the State to afford that process as a matter of Fifth Amendment law. Likewise,

a State's decision to impose additional strictures on arrests does not mean those strictures must be imposed as a matter of Fourth Amendment law.[12]

Virginia cited many cases in its opening brief in which this Court held that an arrest is reasonable under the constitution if it is based on probable cause.[13] The respondent notes that in these cases, the arrest was authorized by state law. Resp't Br. 36-37 and n.9. However, it is noteworthy that in repeatedly reaffirming the constitutional validity of an arrest based on probable cause, the Court has not incorporated into its analysis the longstanding strictures imposed under state law on the authority of state officers to arrest. This silence is hard to square with a jurisprudence that would ascribe a potentially dispositive role to state law in this area and with the fact that state law strictures on the arrest authority

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[12] The same is true in the Double Jeopardy context, where state law defines the elements of the crime but the constitutional Double Jeopardy standard independently determines whether a prosecution violates federal guarantees. If a State were to afford defendants additional protections in this area, for example by precluding a state prosecution when the defendant has been prosecuted for the same conduct by the federal government or another state, *United States v. Wheeler*, 435 U.S. 313 (1978) (discussing dual sovereignty doctrine and Double Jeopardy), those additional protections would not acquire constitutional magnitude. *See, e.g., Virginia Code* § 19.2-294 (precluding separate prosecutions based on the "same act").

[13] *See Devenpeck*, 543 U.S. at 152; *Maryland v. Pringle*, 540 U.S. 366, 370 (2003); *Whren*, 517 U.S. at 817; *Watson*, 423 U.S. at 415-17 (1976); *Robinson*, 414 U.S. at 235.

of constables and police officers have been in place from the very dawn of the Colonial era until the present time.

III. RE-AFFIRMING THE CONSTITUTIONAL VALIDITY OF AN ARREST BASED ON PROBABLE CAUSE WILL NOT PROVIDE CARTE BLANCHE FOR THE POLICE TO ARREST CITIZENS AT WILL.

Moore attempts to raise the specter of "the potential for abuse of the search power" under the probable cause standard. Resp't Br. 24. He goes so far as to contend that "opportunities for custodial arrest will be almost limitless." Resp't Br. 24.[14] The argument is without merit.

First, officers are constrained by the constitutional requirement of probable cause. Any evidence seized pursuant to an arrest that is not based on probable cause will be suppressed as a matter of federal constitutional law. *See Mapp v. Ohio*, 367 U.S. 643, 655 (1961). This "long-prevailing standard[ ]" of probable cause represents "the best compromise that has been found for accommodating [the] often opposing interests" of the government and

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[14] Moore highlights the fact that the police did not take him to a police station for booking but instead drove him to his hotel room and searched him there, along with a search of his hotel room. Resp't Br. 24. However, the search of Moore's hotel room was based on his consent, J.A. 43-44, a fact that Moore did not challenge in state court.

a private citizen. *Brinegar v. United States*, 338 U.S. 160, 176 (1949). In this case, the existence of probable cause to believe Moore committed a crime, one punishable by up to one year in jail, supplied the *constitutionally* required objective basis for the arrest. Nothing more is required.

Second, "it is in the interest of police to limit petty-offense arrests." *Atwater*, 532 U.S. at 352. As a result, this Court observed "a dearth of horribles demanding redress." *Id.* at 353. If the constitutional probable cause standard has worked well and if there is no broader problem of any significance to address, the existing standard of probable cause should be reaffirmed rather than dramatically altered.

Third, police officers who violate state laws governing arrests expose themselves to the sanctions provided under state law.[15] If these remedies prove inadequate – and the paucity of cases alleging violations of the misdemeanor-summons statutes suggests that they are not – Virginia's General Assembly can enact still more protections. Moreover,

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[15] Moore stresses the testimony of one of the arresting officers that he believed it was his "prerogative" to make an arrest. J.A. 15. To the extent the officer's testimony can be construed as an assertion that Virginia officers are free to ignore Virginia law, the officer is wrong. A Virginia officer who violates *Virginia Code* § 19.2-74 risks a lawsuit for false arrest, *Jordan v. Shands*, 500 S.E.2d 215, 218 (Va. 1988), incurs the possibility that the suspect will exercise his right to resist an illegal arrest, *Virginia v. Hill*, 570 S.E.2d 805, 808 (Va. 2002), and even risks outright dismissal from the force. *See Virginia Code* § 46.2-936.

imposing the drastic remedy of exclusion as a matter of federal constitutional law would create powerful disincentives for the States to impose limitations on police arrest authority, and could encourage some States to repeal existing protections. Moore's hyperbole regarding the potential for limitless abuse of police power is simply groundless.

At present, the bright-line rule of probable cause is well established and straightforward. If, as the Court noted in *Atwater*, warrantless misdemeanor arrests do not amount to a problem of any significance[16] – and misdemeanor arrests that violate state law would be an even smaller subset of that group – there is no reason to forsake a clear, simple, settled standard in favor of a more complex, uncertain standard. Rather than imposing a federal constitutional remedy for a problem of state law, this Court should allow the States to decide how violations of state law by state officers should be punished. States have done so before the United States Constitution was even considered, and States should be allowed to continue to exercise this sovereign prerogative. Affirming the ongoing validity of the probable cause standard without extending the federal constitutional remedy to state law strictures on arrest is not only the choice most in harmony with our constitutional system of dual sovereignty, it is also the soundest choice from a jurisprudential standpoint.

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[16] 532 U.S. at 353.

CONCLUSION

For the reasons above, those noted in the Brief, and in the Amici Briefs of the United States and the States, the Court should **REVERSE** the judgment below.

Respectfully submitted,

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December 28, 2007